

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Approval of Proposed Transition Service Rate for  
Large Commercial and Industrial Customers

Order Following Hearing

O R D E R N O. 24,117

January 30, 2003

**APPEARANCES:** Gerald M. Eaton, Esq. for Public Service Company of New Hampshire; James T. Rodier, Esq. for Freedom Partners, LLC; McLane, Graf, Raulerson & Middleton, P.A. by Steven V. Camerino, Esq. for Constellation NewEnergy, Inc.; David W. Lavoie for Sprague Energy Corp.; The Dupont Group by James P. Monahan for Competitive Energy Services of New Hampshire, LLC; Michael S. Giaimo for Business & Industry Association of New Hampshire; Office of Consumer Advocate by Michael W. Holmes Esq. on behalf of residential ratepayers and Donald M. Kreis, Esq. of the Staff of the New Hampshire Public Utilities Commission.

**I. BACKGROUND AND PROCEDURAL HISTORY**

On September 13, 2002, Public Service Company of New Hampshire (PSNH) filed a petition and pre-filed direct testimony with the New Hampshire Public Utilities Commission (Commission) seeking approval of a Transition Service rate for large commercial and industrial customers of 4.47 cents per kilowatt-hour effective on February 1, 2003 and applicable until February 1, 2004. The instant filing applies to customers taking Transition Service and also subject to PSNH's Primary Delivery Service Rate GV or the Company's Large General Delivery Service Rate LG. As of February 1, 2003, the "actual, prudent and reasonable" cost standard governs the calculation of the

Transition Service rate for these customers. As of February 1, 2004, this standard for calculating Transition Service will apply not just to these customers but to all PSNH customers that have not yet chosen another energy supplier. See generally RSA 369-B:3, IV(b)(1)(B) (C) and (D) (setting forth rate scheme for PSNH Transition Service customers).<sup>1</sup>

The Commission entered an Order of Notice on September 20, 2002, establishing a deadline for the submission of intervention petitions, providing for a Pre-Hearing Conference on October 8, 2002 and setting forth a tentative procedural schedule. Timely intervention petitions were received from Freedom Energy, LLC d/b/a Freedom Energy Partners (Freedom), Sprague Energy Corporation (Sprague), Competitive Energy Services - New Hampshire, LLC (CES), the Governor's Office of

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<sup>1</sup> Technically, RSA 369-B:3, IV(b) does not directly impose standards on the Commission for regulating PSNH's Transition Service rates but, rather, sets forth certain conditions required in the Commission's finance order approving the securitization of certain of PSNH's stranded cost obligations pursuant to the Agreement to Settle PSNH Restructuring approved by the Commission in Docket No. DE 99-099 ("Restructuring Agreement"). As the Legislature has explained, "[o]nce stranded costs are securitized through rate reduction bonds, a utility immediately recovers through a lump sum payment that portion of its stranded costs underwritten by the bond." RSA 369-A:1, VII. "As such, the risk of not recovering that portion of a utility's stranded costs is completely removed" and the utility "may then favorably recapitalize its debt structure taking advantage of its improved risk profile." *Id.*, see also *id.* at V (noting that rate reduction bonds "are instruments underwritten for recovery by a guaranteed promise of customer repayment as part of the stranded cost recovery charge on a customer's bill"). The Commission has issued a finance order with the requisite conditions in it, see *PSNH Proposed Restructuring Settlement* (Order No. 23,550), 85 NH PUC 567 (2000), and the Rate Reduction Bonds were thereafter issued.

Energy and Community Services (ECS) and the National Energy Marketers Association (NEMA). The Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers.

The Pre-Hearing Conference took place as scheduled, with the Commission granting all pending intervention requests. Immediately thereafter, the parties met with Commission Staff (Staff) for a technical session, following which Staff submitted a written report of the session. On October 17, 2002, by secretarial letter, the Commission approved the tentative procedural schedule set forth in the Order of Notice, with certain minor modifications recommended by the parties and Staff, and also adopted a recommendation from the parties and Staff with regard to informal resolution of any discovery disputes not involving claims of privilege. Discovery ensued, pursuant to the procedural schedule.

Constellation NewEnergy, Inc. (Constellation) submitted an intervention request on October 21, 2002. The Commission granted the petition by secretarial letter on October 31, 2002, noting the lack of prejudice to any other party. On November 1, 2002, PSNH submitted a motion for confidential treatment with respect to its response to a data request submitted by Staff. No objections to this motion have been filed.

A technical session took place on November 5, 2002. On November 11, 2002, Freedom submitted pre-filed testimony, with similar submissions from Sprague, Constellation and CES the following day. On December 2, 2002, at the request of Staff, PSNH made a filing containing certain updated calculations that had the effect of revising the Company's proposed rate from 4.47 cents per kilowatt-hour to 4.58 cents.

On December 4, 2002, the Commission on its own motion instructed the parties to submit briefs on or before December 16, 2002, setting forth the legal basis for the positions they intended to advance at hearing. Such submissions were duly made by PSNH, CES, Constellation, Freedom and Sprague.

A settlement conference was held on December 5, 2002, but settlement was not achieved. Thereafter, PSNH filed an assented-to motion seeking leave to file pre-filed rebuttal testimony by December 11, 2002 and Constellation sought to extend the deadline to December 13. By secretarial letter of December 11, 2002, the Commission authorized the submission of written rebuttal testimony on the deadline proposed by Constellation. PSNH thereafter submitted pre-filed rebuttal testimony. Constellation likewise made a submission in rebuttal, but indicated at hearing that it was withdrawing the filing.

The merits hearing took place on December 18 and 19, 2002. At the hearing, the Business and Industry Association of New Hampshire (BIA), although not a party, offered a statement in support of the PSNH proposal. PSNH, CES, Constellation, Freedom and Sprague presented oral testimony. As instructed by the Commission, various parties submitted responses to record requests arising out of the hearing on or before December 27, 2002. These responses were duly submitted.

Letters in support of the PSNH position were submitted by the New Hampshire Lodging and Restaurant Association, the New Hampshire Grocers Association, and the Air Force Legal Services Agency, representing all federal executive agencies that are PSNH customers.

## **II. POSITIONS OF THE PARTIES**

### **A. Public Service Company of New Hampshire**

Public Service Company of New Hampshire's ("PSNH") position is that RSA 369-B:3, IV(b)(1)(C) mandates that the Transition Service rate for PSNH's larger customers be set in a formulaic manner based upon "actual, prudent, and reasonable costs of providing such power." PSNH states that the above-referenced statute does not provide for including any costs or other adjustments as suggested by intervenors.

PSNH therefore proposed a Transition Service rate for large commercial and industrial customers of 4.6 cents per kilowatt-hour,<sup>2</sup> based on estimated costs consisting of the following components: fuel-related costs associated with operation of its retained non-nuclear generation portfolio; non-fuel expenses (i.e., operations and maintenance, depreciation and taxes) associated with these operations; a return on the rate base represented by the generation assets; costs associated with participation in the New England Power Pool (i.e., ancillary services, uplift charges and capacity charges); power purchase obligations in connection with the Vermont Yankee nuclear power plant; net expenses associated with purchases and sales of energy in the New England regional wholesale market; and the market value of PSNH's obligations to purchase energy from Independent Power Producers (IPPs) in its service territory. Not included in this estimate is the cost of IPP power to the extent it exceeds PSNH's estimate of the market value of this output and the costs of administering PSNH's provision of Transition Service.

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<sup>2</sup> The calculations giving rise to PSNH's requested rate of 4.6 cents appear in Exhibit 2 (PSNH's December 2 revision of its initial calculation, revising the rate request to 4.58 cents) and Exhibits 3, 4 (further correcting the December 2 calculations to arrive at the 4.6 cent figure).

According to PSNH, suggestions that the rate calculated by PSNH is wrong because it does not include the above-market cost of mandated purchases under PURPA from the IPPs are incorrect because they ignore the treatment of the mandated IPP purchases that is set forth in the PSNH Restructuring Settlement. In that Settlement, PSNH notes, rates were unbundled into components such as the Delivery Charge, Systems Benefits Charge, Transition Service Charge and the Stranded Cost Recovery Charge.

PSNH observes that the SCRC is defined by the Settlement as "the portion of the unbundled retail delivery bill that is a non-bypassable charge as provided in RSA 374-F:3 to recover the portion of PSNH's stranded costs that are allowed by this Agreement." The SCRC, states PSNH, includes the RRB Charge, nuclear decommissioning and IPP costs, non-securitized stranded costs, and other costs and expenses allowed by the Agreement. Pursuant to the Settlement, PSNH argues, the Commission has approved the inclusion of IPP costs in the Stranded Cost Recovery Charge and not in the separate unbundled Transition Service Charge. PSNH states that its proposal complies with the treatment of IPP costs that is reflected in the Restructuring Agreement.

PSNH argues that the above-market costs of IPPs are stranded costs within the meaning of RSA 374-F:2, IV. The Company asserts that following the restructuring of retail electricity markets, PSNH could not reasonably expect to recover the cost of mandated long-term rate orders and long-term purchase power contracts with IPPs in a competitive market because such costs are well above the market price. PSNH notes the IPP rate orders and power contracts were obligations that antedated restructuring and that PSNH could have reasonably expected to recover these costs under the former bundled retail rate structure. PSNH proposes to include the market cost of this power in the Transition Service costs while recovering the above market cost through the SCRC. Accordingly, PSNH's proposed Transition Service rate does not include the above-market component of IPP costs which is collected through SCRC.

PSNH seeks to refute arguments by the competitive suppliers to the effect that the full cost of IPP power, including the above-market cost, is the actual cost of generation used to supply Transition Service and, therefore, it should be included in the calculation of the Transition Service prices. PSNH counters this argument by stating that (1) the above-market IPP costs are expenses PSNH could not reasonably be expected to recover in a restructured energy market, absent a



specific mechanism to do so, see RSA 374-F:2, IV, and (2) the Legislature directed that the collection of stranded costs shall be made through a specific mechanism, which for PSNH is the SCRC. RSA 374-F:3, XII(d).

The second reason cited by PSNH to reject the intervenors' call for inclusion of the full price paid to IPPs is the resulting bypass of stranded costs. PSNH observes that revenue from Transition Service is displaced when a customer chooses a competitive supplier: the customer pays the competitive supplier's price for energy, and the Transition Service rate is not charged to this customer. If stranded costs are shifted to the Transition Service price in order to make the price high enough to allow competitive suppliers to sell power, PSNH concludes that the customers who choose a supplier will avoid paying those stranded costs. Since the SCRC by statute is a nonbypassable charge, PSNH argues that such cost-shifting would be a violation of the law and would also be unfair to other customers. See RSA 374-F:3, XII(d).

PSNH states that it has provided detailed data and calculations which evidence adherence to the law in the preparation of the Transition Service rate that is proposed. PSNH avers that, unless the Commission determines PSNH erred in its calculations, the rate proposed is the only lawful rate for

Transition Service for PSNH's larger customers that may be approved for effect in February 2003.

**B. Competitive Energy Services**

Competitive Energy Services ("CES") argues that this case involves the interpretation of law and the determination of whether there will ever be a competitive retail market for electricity in PSNH's service territory, and not a case of simple mathematics to compute PSNH's cost of service as PSNH has implied.

CES believes that PSNH has made a number of errors in its computation. The two most significant errors claimed by CES are PSNH's failure to include the full costs of purchasing energy from the various IPPs under the respective rate orders issued by the Commission and its underestimation of the market price of electricity. CES argues that there are two consequences to these alleged errors. First, with a price that does not reflect its full costs of providing such service, CES avers, PSNH has proposed a price that is well below current market prices. CES states that this will block any competition that would have otherwise occurred, denying customers their ability to choose retail suppliers. Second, according to CES, by including only a small percent of its costs to purchase electricity from the IPPs and by underestimating the market

price of electricity, PSNH will increase the amount of stranded costs that all of its customers will have to pay.

CES states that the Transition Service price should be established so that it fully recovers all of the costs incurred by PSNH in providing the service, including the full costs associated with purchasing IPP electricity, the full market price of purchases of market electricity PSNH must make to supplement its own generation, and the full costs associated with undertaking to provide Transition Service, including staff resources deployed to secure and manage electricity supply and to provide customer service.

CES did not undertake to estimate what the price of Transition Service should be. However, it argues that PSNH's estimated price of Transition Service would increase from 4.47 cents per kilowatt-hour to 5.83 cents per kilowatt-hour if the IPP entitlements are valued at the rates in the rate orders rather than at PSNH-estimated market prices. In addition, CES states that Sprague has provided convincing evidence that the market value of electricity used by PSNH to compute its costs is low, and that if the correct market values are used, the price of Transition Service would increase by over 0.5 cents per kilowatt-hour, even if IPP entitlements are not valued at the rates in the rate orders.

CES avers that PSNH opted not to include the full cost of the IPP entitlements so as to ensure rate stability. However, CES states, this approach brings stability at the expense of the development and promotion of a competitive retail electricity market. Rate stability, according to CES, can be assured by establishing an offsetting credit on the Stranded Cost Recovery Charge by an amount equal to the reduction in stranded costs associated with valuing the IPP entitlements at their full costs rather than at their fair market value. This offsetting credit will ensure that rates remain stable for all customers remaining on Transition Service, argues CES. According to CES, PSNH would see a reduction in its Part 2 stranded costs, since there would not be stranded costs associated with the IPP entitlements, and there would be a corresponding increase in revenues from the provision of Transition Service.

CES avers that there are number of objectives that the Commission must seek to satisfy in implementing NH's Restructuring Act and the Settlement Agreement: one is promoting a competitive retail market for electricity and customer choice; a second is protecting PSNH's financial condition as that condition is established through the Settlement Agreement; and third is to ensure rate stability at levels generally consistent

with those anticipated as a result of the Settlement Agreement and PSNH's legislative obligation to provide Transition Service. According to CES, PSNH has put forth a proposed Transition Service price that relies on the utility's interpretation of the law but fails to accomplish one of the three objectives - the PSNH proposed Transition Service price will not promote the development of a competitive retail market for electricity and offer choice to customers. In contrast, CES says that it puts forth a proposal that meets each of the three objectives: one that will not only encourage development of a retail market, but will actually stimulate one. CES asserts that its proposal will not impact the financial integrity of PSNH; rather, it will ensure rate stability for those that choose to remain on Transition Service, and may lead to rate decreases for those that opt to purchase their electric requirements in the competitive market.

**C. Constellation NewEnergy**

Constellation NewEnergy (Constellation) maintains that PSNH does not reflect the full costs of providing Transition Service, which Constellation claims is a violation of the requirements of RSA 369-B. Among other things, Constellation points out, PSNH fails to include the full cost of power from its IPP contracts, does not reflect the cost of migration risk

associated with the service and lastly, does not reflect the full administrative and other costs of providing the service.

PSNH only included in its IPP costs the projected market value (energy and capacity) for IPP purchases, rather than the actual costs for the IPPs as required by statute, according to Constellation. In response to PSNH's argument that because the Restructuring Agreement includes a way for recovering above-market IPP costs, these costs should not be considered when calculating the actual cost, Constellation argues that PSNH fails to reconcile this with the fact that the settlement also provides for a way to recover the fossil/hydro costs, yet PSNH did include those costs in calculating the Transition Service rate.

By excluding the above-market portion of its IPP costs from the new price, PSNH has varied from the legislative directive that the Commission is charged with implementing, according to Constellation. Constellation argues that the purpose of setting a Transition Service price based on PSNH's actual cost of providing service is, as the Legislature has stated in RSA 374-F:3, V(b), to provide a "predictable ceiling" price that will result in the Transition Service price "increas[ing] over time to encourage customers to choose a competitive supplier during the transition period."

In establishing the structure for Transition Service pricing, Constellation posits, the Legislature adopted a policy that was intended to move large customers toward a competitive market more quickly than smaller customers. Thus, for smaller customers, the Transition Service price was fixed for an extended period of time. RSA 369-B:3, IV(b)(1)(B). For the larger customers who will be affected by the present docket, the Legislature fixed prices for a shorter period of time. RSA 369-B:3, IV(b)(1)(C). Under this structure, Constellation states, the price for Transition Service after January 1, 2003 is required to be either a competitively bid price or PSNH's costs of providing the service. Constellation claims that these two concepts are not intended to be separate from one another.

Another issue Constellation argues that PSNH has not considered is migration risk. According to Constellation, migration risk is a form of volume risk. Constellation states that it is a risk that comes with Transition Service because customers are free to leave at any time to take service from a competitive supplier. Where a competitive supplier provides the power for Transition Service, Constellation avers, that firm estimates the rate of customer migration, and procures supply to service the expected load over time. Constellation points out that the supplier bears a risk that the rate of migration will

be higher or lower than expected, leaving it with either excess supply or inadequate supply. Competitive firms supplying Transition Service power reflect the cost of that risk in their price, states Constellation.

Constellation states that it appears that PSNH has estimated zero customer migration. Constellation notes that as customers leave Transition Service, PSNH plans to sell the excess generation into the market. Constellation argues that there is a risk that the price that PSNH realizes in the market for that generation will be less than the Transition Service price, causing PSNH's Transition Service revenues to be lower than expected.

Constellation argues that PSNH has not assumed the migration risk in the Transition Service price, and that instead, the risk has been shifted to customers. If customer migration causes PSNH to realize lower Transition Service revenues, PSNH proposes to make up the difference through the Stranded Cost Recovery Charge, Constellation points out. In such a situation, Constellation notes, customers will pay more through a different part of the bill. Thus, Constellation argues, the Transition Service price rate does not reflect the full costs of the service. According to Constellation, the current undercollection of \$12 million in Transition Service



provides an example of how, if Transition Service prices are insufficient to recover the full costs of providing the service, those costs will be collected at a different time, through a different part of the bill, and potentially from different customers.

Constellation posits that there are two options to deal with migration risk. In the first option, Constellation states, if the migration risk is to be borne by customers, then the variability in cost should be reflected in the Transition Service price, and it should be presented as a variable price, with any reduction in PSNH's net revenue due to migration producing an increase in that price, as opposed to an increase in the Stranded Cost Recovery Charge. The other option, according to Constellation, would be to price the migration risk and include that cost in the Transition Service price.

Beyond suggesting that varying prices monthly would better reflect the potential effects of migration on Transition Service revenue, Constellation also notes that PSNH's costs of providing Transition Service energy vary significantly from month to month. According to Constellation, the Commission should use this proceeding to establish a varying but known-in-advance "strip" of monthly prices. This, Constellation reasons, would allow the price to reflect conditions in the market more

accurately while opening an opportunity for competitive suppliers to provide value to customers in the form of a fixed-price option.

Constellation argues that costs associated with providing Transition Service that have not been included in the proposed price include administrative costs associated with the service, such as procurement, contract management, credit, collections and bad debt. Constellation states that PSNH has not included the full costs of its IPP contracts as well, and instead it has proposed to exclude the "above-market" portion of those contracts and to collect them instead through the Stranded Cost Recovery Charge.

Constellation argues that the whole structure of Transition Service under RSA 374-F and RSA 369-B makes clear that Transition Service is intended to provide a "ceiling" that will protect customers, but will still encourage them to move to the competitive market over time. According to Constellation, the Legislature did not intend to "low-ball transition service pricing for an extended number of years and thereby indefinitely delay the move to a competitive market."

#### **D. Freedom Partners**

Freedom argues that PSNH seeks to implement RSA 369-B:3, IV (b) (1) (C), (as amended by 2001 N.H. Laws Chapter 29) in a

manner that implicitly repeals RSA 374-F:3, V(b). Freedom states that this is a clear error of the law. Freedom argues that the Commission must complement Chapter 29 with RSA 374-F:3, (b) short of a repeal, by defining PSNH's actual, prudent and reasonable costs in a manner that provides predictable ceiling prices and encourages customers, over time, to choose a competitive supplier.

Freedom states that if PSNH's proposed rate of 4.47 cents per kWh is approved by the Commission, there will be few, if any, large customers leaving PSNH. Freedom argues that PSNH's proposal will guarantee that the transition period will have to be extended by the Legislature.

Freedom would like a plan that will implement the existing legislative framework to allow for the transition of a substantial number of PSNH's large customers to competitive supply over the next three years prior to the termination of the transition period. According to Freedom, the statutory standard (actual, reasonable and prudent cost) is very broad and allows for the exercise of substantial discretion in determining PSNH's cost of service.

Freedom proposes that if IPP costs are treated analogously to the capital related to the fossil and hydro costs and included in the Transition Service price, that price would

rise to 5.83 cents per kwh, according to PSNH's data. If such an adjustment were made, says Freedom, this would become the "shopping credit." In Freedom's proposal, corresponding with this, PSNH would apply an offsetting credit to the bill of all customers so that the net amount paid to PSNH by non-migrating customers is 4.47 cents.

Freedom states that its proposal is intended to supplement and not conflict with the positions of other competitive suppliers. Freedom also notes that a mechanism would have to be worked out to ensure that the reconciliation of any Transition Service under-recovery does not impact smaller customers.

#### **E. Sprague Energy**

Sprague accepts the majority of the forecasts and estimates that have been filed by PSNH. Where Sprague differs is on the amount of IPP costs to be included, the market price approximation and the mechanism for reconciling over- or under-recoveries of Transition Service expenses. In its proposed alternative Transition Service rate, Sprague has included the full cost of IPP contracts. Sprague argues that the Legislature has specified that the price of Transition Service for certain of PSNH's commercial and industrial customers "shall be PSNH's actual, prudent, and reasonable costs of providing such power as

approved by the commission.” The actual cost of providing Transition Service to commercial and industrial customers includes the total cost of IPP contracts, avers Sprague.

Sprague claims that the rate filed by PSNH is below current market prices and is not consistent with the intent of the Legislature when it restructured the electric market. In such a case, competitive suppliers, such as Sprague, will not be able to compete, and customers will not switch to the competitive market, argues Sprague. Sprague claims that any customer savings will be illusory because the actual cost to supply Transition Service will be substantially higher than the rates that have been filed. The filed rates, says Sprague, will result in under-collections that must be collected with interest from customers in the future. The Commission, however, can minimize the impact on customers that may not have access to the competitive market by crediting the cost of IPP contracts that are already being recovered through the SCRC, according to Sprague. Sprague states that RSA 369-B:3, IV (b)(1)(D) provides the flexibility to accomplish this.

Sprague proposes that the Commission apply a “Shopping Credit” to all customers’ bills so that actual rates to customers that do not select a competitive supplier are no higher than the PSNH proposed rates. According to Sprague, in

such a case, customers that choose a competitive supplier would see additional savings.

Sprague avers that its proposed market price differs from the filing of PSNH in that Sprague went to the forward markets to document prices at which parties were actually buying and selling power during the period the Transition Service rates will be in effect.

Lastly, Sprague proposes that any over- or under-collections be treated as an adjustment to Transition Service rates in the subsequent period, rather than being reconciled in the Part 3 Stranded Cost charge. According to Sprague, PSNH expects to be under-collected on Transition Service by approximately \$12 million by the time the new rates go into effect in February 2003, and PSNH wants to add this amount to stranded costs and recover it through the Stranded Cost Recovery Charge. If a customer elects to procure its power supply from the competitive market, Sprague argues, it should not be subjected to expenses or credits associated with over- or under-recoveries of Transition Service expenses that occurred after it stopped taking Transition Service.

#### **F. Office of Consumer Advocate**

OCA expresses concern about the possibility that under-recovery of revenue requirements associated with Transition

Service for large commercial and industrial customers would be a cost ultimately borne in part by residential ratepayers. At hearing, OCA indicated that it is generally supportive of PSNH's proposal. In the view of OCA, other approaches - i.e., setting Transition Service rates in a manner better calculated to stimulate the existence of a competitive market for retail energy -- involve policy choices of sufficient magnitude better left to the Legislature.

### **III. COMMISSION ANALYSIS**

#### **A. STATUTORY FRAMEWORK**

This case requires us to construe a complex statutory scheme that has evolved significantly since the Legislature first undertook to restructure New Hampshire's electric industry in 1996. The statutory provisions at issue concern not only the electric industry generally, but take up with specificity the restructuring of PSNH.

Although it is unusual for statutory enactments to concern themselves explicitly with only one person or entity, PSNH has been in an unusual situation vis à vis industry restructuring. When the Commission acted in 1997 to restructure New Hampshire electric utilities pursuant to RSA 374-F, PSNH and other utilities responded by filing a lawsuit in federal court and obtaining an injunction. *See Public Service Co. of N.H. v.*

*Patch*, 167 F.3d 15 (1st Cir. 1998) (describing history of PSNH litigation). The PSNH Restructuring Agreement, entered into by PSNH two years later, was intended to resolve the issues in the lawsuit with respect to that utility, and allow for restructuring to proceed in the Company's service territory. The Commission approved the Restructuring Agreement in 2000 with certain conditions later accepted by the signatories. See *PSNH Proposed Restructuring Settlement* (Order No. 23,443), 85 NH PUC 154, *on reh'g*, 85 NH PUC 536 (2000).

As already noted, a central tenet of the Restructuring Agreement was the securitization of certain of PSNH's stranded, i.e., otherwise unrecoverable, costs - a process that required the legislature's imprimatur. As a quid pro quo for this imprimatur, which has the effect of precluding the state from modifying the securitization provisions in the future, the Legislature opted to impose certain specific requirements on PSNH. Certain of those requirements loom large in this case, as will be discussed. As will also be described in more detail below, subsequent to the initial restructuring of PSNH, the Legislature reacted to changing conditions in the regional and national electric industries by enacting provisions that bear directly on the questions presently before us.



### **1. Statutory Construction Principles**

The parties to this case urge upon us conflicting interpretations of the complex statutory scheme governing the PSNH restructuring. The crux of the dispute concerns whether above-market IPP costs should be defined as a stranded cost or as a cost of providing transition service. To resolve the conflicts, we first must seek to discern the plain and unambiguous meaning of the statutory language, and then undertake to apply that language in a manner designed to effectuate the lawmakers' manifest intent. *See, e.g., Public Service Co. of N.H.*, Order No. 24,086 (Nov. 15, 2002), slip op. at 22 (citing cases).

As to aspects of the case that are said to turn on questions of legislative intent, recourse is necessary to certain other, well-established principles of statutory interpretation. Generally, "when interpreting several statutory provisions that involve the same subject matter, the provisions must be construed together so that they lead to a logical result reflective of the legislative purpose of the statute." *In re Ryan D.*, 146 N.H. 644, 646 (2001). In such circumstances, it is necessary to consider all applicable statutes rather than fail to effectuate one or more of them, and to avoid if possible construing any of the applicable provisions so as to contradict

another. See, *In re Coderre*, \_\_\_ N.H. \_\_\_, \_\_\_, 807 A.2d 1245, 1248 (N.H. 2002).

There are, however, limits to this general principle of construction that apply in circumstances where such harmonization is impossible. "[S]pecific statutory language should control more general language when there is a conflict between the two." *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 122 S.Ct. 782, 787 (2002); see also *Crowley v. Frazier*, 147 N.H. 387, 391 (2001). Also, more than one of the enactments at issue in this proceeding includes explicit legislative findings and/or declarations of public policy. "A legislative declaration of purpose is ordinarily accepted as a part of the act," but only where such declaration is compatible with the statute's "meaning and effect." *Opinion of the Justices*, 113 N.H. 201, 203 (1973). Though obviously of significance, "[t]he announced purpose of a statute is not conclusive as to its meaning." *Id.* In other words, if a specific statutory provision is arguably inconsistent with one or more of the stated legislative goals, we are to follow the specific directive of the Legislature to the extent we can. In such a case, we must leave it to the Legislature to determine if a conflict exists between that directive and one of its stated goals, and if so how to resolve it.

As we seek to understand the intent of the legislation, it is instructive to trace the chronology of the various enactments, taking note of the fact that each successive restructuring-related statute not only builds on its predecessors, but also takes into account the then-current state of an industry in significant flux. In other words, as the restructuring of the electric industry was planned, temporarily thwarted as to PSNH by litigation, resolved as to PSNH via the Restructuring Agreement, implemented and, finally, modified in light of experience here and elsewhere, the Legislature reacted not with complete revisions of the applicable statutory scheme but with a more surgical process of affirming some policy judgments, deferring others and adding refinements.

With these principles in mind, we retrace the path taken by the Legislature, with an eye toward resolving the significant and potentially outcome-determinative differences among the parties with regard to the meaning of these enactments.

## **2. 1996 N.H. Laws 129 and 1998 N.H. Laws 191**

Chapter 129 of the Laws of 1996 marked the advent of the Electric Utility Restructuring Act. As the measure stated,

the most compelling reason to restructure the New Hampshire electric industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets. The overall public policy goal

of restructuring is to develop a more efficient industry structure and regulatory framework that results in a more productive economy by reducing costs to consumers while maintaining safe and reliable electric service with minimum adverse impacts on the environment. Increased customer choice and the development of competitive markets for wholesale and retail electricity are key elements in a restructured industry that will require unbundling of prices and services and at least a functional separation of centralized generation services from transmission and distribution services.

RSA 374-F:1, I.

In service of the Act's expressed overall public policy goal, the statute sets forth a series of 15 "interdependent policy principles" that are intended to "guide" the Commission. RSA 374-F:1, III. Several of these policy principles are directly implicated by the instant proceeding: "[c]ustomer choice," i.e., "allowing customers to choose among electricity suppliers" because this "will help ensure fully competitive and innovative markets," RSA 374-F:3, II; the unbundling of services and rates so as "to provide customers with clear price information on the cost components of generation, transmission, distribution and any other ancillary charges," with generation services "subject to market competition and minimal economic regulation," RSA 374-F:3, III; implementation of restructuring "in a manner that benefits all consumers equitably and does not benefit one customer class to the detriment of another," RSA 374-F:3, VI; the achievement of

"[n]ear [t]erm [r]ate [r]elief" inasmuch as "[t]he goal of restructuring is to create competitive markets that are expected to produce lower prices for all customers than would have been paid under the [previous, traditional] regulatory system," RSA 374-F:3, XI; the recovery by electric utilities of stranded costs that are "determined on a net basis," verifiable, non-bypassable and "reconciled to actual market conditions from time to time." RSA 374-F:3, XII; and implementation of "full customer choice among electricity suppliers in the most expeditious manner possible," although the Commission "may delay implementation in the service territory of any electric utility when implementation would be inconsistent with the goal of near-term rate relief, or would otherwise not be in the public interest," RSA 374-F:3, XV.

Further, set out in the interdependent policy principle denominated as "[u]niversal [s]ervice" is language that bears specifically on the question of Transition Service. This provision, as originally enacted in the 1998 amendments to the Restructuring Act, read as follows:

As competitive markets emerge, customers should have the option of stable and predictable ceiling electricity prices through a reasonable transition period, consistent with the near term rate relief principle of RSA 374-F:3, XI. Upon the implementation of retail choice, transition service should be available for at least two but not more than 4 years after the start of competition, for customers who have

not yet chosen a competitive electricity supplier. Transition service should be procured by competitive means and may be administered by independent third parties. The price of transition service should increase over time to encourage customers to choose a competitive electricity supplier during the transition period. Such transition service should be separate and distinct from default service.

1998 N.H. Laws 191:5, present version codified as RSA 374-F:3, V(b).<sup>3</sup>

The foregoing statutory provisions create the following dilemma: One could set Transition Service prices high enough to stimulate the existence of retail competition, which would further the objective of customer choice, but which would also be in derogation of the objective of near-term rate relief. Likewise, customer choice might be furthered by a rate scheme that allows PSNH, in effect, to recover some costs of providing Transition Service through its Stranded Cost Recovery Charge, but that would undermine the objective of clear price information for customers. This example demonstrates that when a party cites one of the applicable principles in isolation, arguing that it is dispositive, it distorts the true picture.

Apart from the interdependent policy principles, there is another aspect of the Restructuring Act as it was enacted in 1996 that is particularly germane to matters in this docket.

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<sup>3</sup> The significant revisions to this provision, enacted in 2000 and 2001, are discussed *infra*.

The Legislature crafted a specific definition of "[s]tranded costs," viz:

Costs, liabilities, and investments, such as uneconomic assets, that electric utilities would reasonably expect to recover if the existing regulatory structure with retail rates for the bundled provision of electric service continued and that will not be recovered as a result of restructured industry regulation that allows retail choice of electricity suppliers, unless a specific mechanism for such cost recovery is provided. Stranded costs may only include costs of:

- (a) Existing commitments or obligations incurred prior to the effective date of this chapter [i.e., May 21, 1996][;]
- (b) Renegotiated commitments approved by the commission; and
- (c) New mandated commitments approved by the commission.

RSA 374-F:2, IV. Despite the restructuring-related events that have transpired subsequent to May 21, 1996, and the attendant legislative actions, this definition has remained a constant.

### **3. 1999 N.H. Laws 289**

Fully aware that PSNH was in the midst of negotiations with regard to its restructuring under RSA 374-F, the Legislature enacted a bill in the summer of 1999 that was explicitly designed to affect those negotiations. 1999 N.H. Laws 289 declared it "important" that the Legislature "express its understanding of securitization and the criteria that are essential to meet" in order to gain the necessary legislative

approval of such a plan. 1999 N.H. Laws 289:1, II. Beyond including certain explicit instructions to the Commission that were of a procedural nature, see *id.* at section 3, the vehicle in Chapter 289 by which the Legislature made known its views about the future of PSNH was the enactment of RSA 369-A.

RSA 369-A contains certain language that is relevant to the issue of Transition Service for PSNH customers. Specifically, the statute notes that securitization provides "extraordinary benefits" to a utility and its investors and that customers are therefore entitled to certain countervailing benefits, including:

(a) Customers should have the opportunity to choose among a range of competitive suppliers in a manner that promotes public trust in the benefits of competitive options. Public trust is not achieved if a utility uses rate reduction bonds to maintain a commanding presence in all of the traditional utility functions of transmitting, distributing and generating electricity.

(b) Electricity prices should be consistent with RSA 374-F:3, XI, the near term rate relief principles for all customer classes.

(c) Electricity prices should approach the regional average as soon as practicable.

(d) Electricity prices should narrow rather than widen any rate gap for New Hampshire customers.

(e) There should be risk sharing by the utility of the non securitized portion of the utility's stranded costs should regional average prices not be approached as soon as practicable, and, in any event,



substantially before the maturity of the securitization bonds.

RSA 369-A:1, X.

Two observations about this language from RSA 369-A are in order. First, it is no coincidence that these provisions speak directly to the Restructuring Agreement that was ultimately filed in Docket No. DE 99-099. When the Legislature enacted this provision, PSNH had already reached a tentative restructuring agreement with certain key parties and was in the process of reducing it to a final, signed document. Thus it is clear that a central objective of RSA 369-A was to affect those final negotiations.

Second, one can discern that a particular tension inherent in the indeterdependent policy principles of RSA 374-F was then becoming critical from a public policy standpoint. RSA 369-A expresses two policy objectives that are potentially in conflict: the need for rate relief and the desire to stimulate competition in a manner that promotes public trust in the electricity market and prevents PSNH from remaining the dominant force in the local electricity industry at least insofar as energy (as distinct from transmission and distribution) is concerned.

#### **4. The Restructuring Agreement and 2000 N.H. Laws 249**

On August 2, 1999, PSNH and various state officials<sup>4</sup> signed the comprehensive Agreement to Settle PSNH Restructuring (Restructuring Agreement). The Commission issued an order approving the Restructuring Agreement, with certain conditions subsequently accepted by the signatories, in April of 2000. See *PSNH Proposed Restructuring Settlement* (Order No. 23,443), 85 NH PUC 154 (2000). As noted in Order No. 23,443, the original Restructuring Agreement as it was filed in August of 1999 contained numerous provisions that bear upon issues in the present docket. They are summarized as follows:

Costs associated with PSNH's contractual power-purchase obligations in connection with the Independent Power Producers (IPPs) in its service territory were included in the so-called Part 2 stranded costs. *Id.* at 174. Part 2 stranded costs comprise those PSNH stranded costs that were neither subject to securitization (Part 1 stranded costs) nor the risk-sharing provisions (Part 3), which establish a Recovery End Date under which PSNH's ability to recover such costs would

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<sup>4</sup> Those officials included the Governor, the Attorney General, the Executive Director and Secretary of the Commission and the Director of ECS.

terminate.<sup>5</sup> The August 1999 version of the Restructuring Agreement further provided that PSNH's obligation to provide energy to its retail customers would terminate as of Competition Day, i.e., the day on which PSNH's service territory was opened to retail competition. *Id.* at 176. On that date, customers were to have the option of choosing a competitive supplier or taking Transition Service, which was then set to be available for three years after Competition Day. *Id.* The retail price of Transition Service for all customers would have been fixed at 3.7 cents per kilowatt-hour in Year One, 3.8 cents in Year Two and 3.9 cents in Year Three. *Id.* Transition Service was to be procured by competitive means.

An auction of PSNH's non-nuclear generation portfolio was slated to commence within 30 days of Competition Day. *Id.* at 177. PSNH was responsible for the prudent marketing of its IPP entitlements/obligations, with the sale of such entitlements at the ISO New England market clearing price automatically deemed to be prudent. *Id.* at 179. Prior to PSNH's divestiture of its nuclear and non-nuclear generation portfolio, Part 3 stranded costs were to be credited with the net of proceeds,

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<sup>5</sup> Note, however, that deferred IPP-related costs already on PSNH's books as of Competition Day were included in Part 3, as were the revenue requirement associated with any generation assets and purchased power obligations prior to their divestiture, as well as the difference between the cost of providing Transition Service and associated revenues. *Id.* at 175.

above or below book value, from the sales of both PSNH's non-nuclear generation portfolio and its entitlement to output from the Seabrook nuclear power plant. *Id.* at 175.

The Restructuring Agreement explicitly adopted the definition of "stranded costs" contained in the Restructuring Act. See Restructuring Agreement at lines 300-304.<sup>6</sup> The agreement further contains a specific definition of the term "Stranded Cost Recovery Charge" as

[t]he portion of the unbundled retail delivery service bill that is a non-bypassable charge as provided in RSA Chapter 374-F:3 to recover the portion of PSNH's Stranded Costs that are allowed by this Agreement. The SCRC includes the RRB Charge [i.e., the charge that generates the revenue stream to support the Rate Reduction Bonds], nuclear decommissioning and IPP costs, Non-Securitized Stranded Costs, and other costs and expenses allowed by this Agreement.

*Id.* at lines 306-310 (emphasis added). And, significantly for present purposes, the agreement expressly states that "Part 2 of the SCRC will initially recover . . . IPP costs." *Id.* at lines 587-88.

The Commission required PSNH's assent to certain changes in the Restructuring Agreement as a condition of its approval. Among them was an upward revision to the Transition

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<sup>6</sup> Although the references here are to the September 2000 version of the Restructuring Agreement they were unchanged from the Agreement as it was originally filed in 1999.

Service rates, to 4.0 cents in Year One, 4.1 cents in Year Two and 4.2 cents in Year Three, in order to minimize deferrals and "to send customers more realistic price signals." *Id.* at 282. The auction of PSNH's fossil-fuel generation assets was separated from the auction of its hydro-electric facilities, with the former delayed to up to a year after competition day to allow for the possible municipalization of such plants. *Id.* at 283. PSNH was directed to use its generation portfolio to serve the Transition Service load through January 1, 2001.

PSNH responded on May 1, 2000 by submitting a compliance filing to the Commission. In the compliance filing, PSNH in essence accepted the conditions imposed by the Commission, but made a further proposal with regard to Transition Service. Specifically, PSNH pointed to concern among legislators and others that the proposed Transition Service prices were less than the actual market price of such service. Therefore, PSNH proposed that it provide Transition Service from its portfolio of generation assets and entitlements at the retail prices set forth in the order from Competition Day through the date on which the fossil generation assets would be divested (as opposed to the January 1, 2001 date specified in the order).

Thereafter, PSNH would use a competitive bid process to obtain Transition Service supply. Presumably because PSNH believed that its actual cost of procuring this service would be lower than the price path set forth in the order, the Company made an offer with regard to the first 12 months following the fossil divestiture: it would absorb any Transition Service-related costs above the price set in the Agreement for this first year of competitively-procured Transition Service, up to an actual Transition Service bid price of 4.5 cents per kilowatt-hour.

Inasmuch as the securitization provisions of the Restructuring Agreement required legislative approval, *see id.* at 282, the scene then shifted to the State House. What emerged was 2000 N.H. Laws 249, which included a specific legislative determination that implementation of the securitization proposal in the Restructuring Agreement, subject to the conditions in Order No. 23,443 and as the Agreement was further modified in Chapter 249, "will result in benefits to customers that are substantially consistent with the principles contained in RSA 374-F:3 and RSA 369-A:1, X and with RSA 369-A:1, XI." 2000 N.H. Laws 249:2, codified as RSA 369-B:1, VII. This is a significant legislative determination. We discern a clearly expressed judgment by the Legislature that the Restructuring Agreement

strikes an appropriate balance among the potentially conflicting policy objectives outlined in the restructuring-related enactments.

This important legislative determination from 2000 appears, of course, in the context of RSA 369-B -- an entire chapter the Legislature added to the Revised Statutes by way of setting a future policy course for PSNH in the wake of the Restructuring Agreement. As noted, *supra*, RSA 369-B presents a particularly complex legislative scheme in the sense that many of its provisions are not stated as legislative directives in the ordinary sense but, rather, as conditions the Commission must impose on PSNH in exchange for securitization. See RSA 369-B:3. This complicates the interpretive task. Given that the Commission has, in fact, imposed these conditions and securitization has moved forward, no party has suggested that we treat the provisions of RSA 369-B:3 as anything other than binding legislative directives. We agree with this approach.

As originally enacted by Chapter 249, the securitization conditions in RSA 369-B:3 contained detailed provisions with respect to Transition Service. The Legislature required that between two dates specified in the Restructuring Agreement -- Competition Day (which turned out to be May 1, 2001) and initial Transition Service end day (which was to have been

February 1, 2002) - PSNH would supply Transition Service to all customers, with the Commission choosing a Transition Service provider thereafter via a competitive bid process. The legislation was silent on the question of how PSNH should meet its obligation to supply Transition Service. However, it is reasonable to assume that the Legislature was aware of PSNH's May 1, 2000 proposal to use its own generation for this purpose.

Transition service for residential customers, street lighting customers and customers taking service under general delivery service Rate G was to have been available until February 1, 2004, at specified prices: 4.4 cents per kilowatt-hour from May 1, 2001 through February 1, 2002, the lesser of the competitively bid price or 4.4 cents from February 1, 2002 through February 1, 2003, and the lesser of the competitively bid price or 4.6 cents from February 1, 2003 through February 1, 2004. The statute specified that if the competitively bid price exceeded the fixed price, the difference would be reconciled for these customers according to the terms of the Restructuring Agreement.<sup>7</sup>

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<sup>7</sup> This original version of RSA 369-B:3 also provided that at the end of the Transition Service period on February 1, 2004, upon a finding that it is in the public interest, the Commission could randomly assign to registered competitive suppliers up to 25 percent of those customers from this group if such customers had not already chosen a supplier. There is a requirement that the individual customer in question affirmatively approve such an assignment.



There were also provisions governing Transition Service for all other PSNH customers - i.e., the large commercial and industrial customers at issue in this proceeding. For these customers, Transition Service was to be available at a pre-determined price (subject to reconciliation) only until February 1, 2003, with the price set at 4.4 cents per kilowatt-hour through February 1, 2002, and at the competitively bid price thereafter.

Finally, this original version of RSA 369-B:3 contained a mechanism for reconciling differences between the price of Transition Service and PSNH's actual, prudent and reasonable costs of providing such power between Competition Day (May 1, 2001) and the initial Transition Service end day (February 1, 2002). Any such difference was to be separated between the two groups of customers described above, used first to offset any differences between the mandated price and the competitively bid price during the final year of Transition Service for the class of users not consisting of large commercial and industrial customers, and then the "net reconciled for each group of customers either by changing the recovery end date, or by decreasing the Stranded Cost Recovery

Charge, as the commission finds to be in the public interest."

2000 N.H. Laws 249:2.<sup>8</sup> See also RSA 369-B:3, IV(b) (1) (D).

Thus, as of the enactment of Chapter 249 in June of 2000, the Legislature was still fully committed to a complete divestiture of PSNH's generation portfolio and an end to Transition Service by a date certain. It is also clear that, at that time, the Legislature had determined that the original Restructuring Agreement would have effected too abrupt a transformation of the PSNH service territory from regulated to unregulated retail energy prices and, concomitantly, from a vertically integrated electric utility to a system reliant on merchant generation. In addition, it is noteworthy that the Legislature used the term "offset" here to describe the application of (a) the difference between the Transition Service price and PSNH's actual costs to (b) any differences between the mandated price and the competitively bid price during the final year of Transition Service for smaller consumers. The fair inference from this choice of words is that the Legislature expected that both the specified price in the statute and the competitively bid price for Transition Service for small consumers would be higher than PSNH's costs (a result that

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<sup>8</sup> The 2000 legislation also effected a revision to an RSA 374-F:3 policy principle, quoted *supra*, that is of significance to this case. Specifically, the paragraph presently codified as RSA 374-F:3, V(b) was amended so that the

occurs when above-market IPP costs are excluded from PSNH's actual costs). The Legislature apparently contemplated that the excess revenues from the period when PSNH used its assets to provide Transition Service could then be used to moderate any potential rate increase when Transition Service for smaller customers became based on the wholesale market.

Chapter 249 provided the ultimate legal foundation upon which the Restructuring Agreement, including its securitization provisions, became effective. On September 8, 2000, the Commission issued the requisite finance order, *PSNH Proposed Restructuring Settlement*, 85 NH PUC 567 (2000) as well as an order on rehearing clarifying the Commission's approval of the agreement and taking note of Chapter 249's requirements, *PSNH Proposed Restructuring Settlement*, 85 NH PUC 536, *on reh'g*, 85 NH PUC 645 (2000). PSNH submitted a revised and conformed version of the Restructuring Agreement on September 22, 2000. Pursuant to that agreement, and in light of the various conditions precedent contained therein, Competition Day occurred on May 1, 2001 and the PSNH service territory was officially opened to retail competition.

Certain significant events then transpired. In the wake of electric industry restructuring in California (pursuant

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minimum Transition Service period would be one, rather than two, years. See

to a statutory scheme significantly different than the New Hampshire model), electric users on the West Coast suffered extreme price increases during the winter of 1999-2000 and some consumers experienced rolling blackouts. Allegations have also been made of market manipulation in the West, not only of wholesale electricity prices, but of natural gas prices, as well. There was also a significant run-up in the price of natural gas across the nation, with prices reaching levels that had not been seen for more than a decade. Finally, the New England competitive wholesale market had opened on May 1, 1999, and in its initial operation a number of anomalous price spikes occurred.

#### **5. 2001 N.H. Laws 29**

The Legislature reacted to these developments by enacting 2001 N.H. Laws 29, which brings the applicable statutory scheme to its present version. Not only did Chapter 29 make certain important changes to the statutory requirements for PSNH Transition Service, but it also contained a series of detailed legislative findings to explain the basis for the actions. Specifically, the Legislature made these findings:

I. Commodity prices for oil and natural gas have substantially increased in the past year, resulting in higher wholesale electricity prices in New Hampshire and throughout the New England region. The higher

wholesale electricity prices have prevented competitive electricity suppliers from being able to compete with standard transition service, causing them to exit the market or not even enter it in the first place.

II. Given the increase in wholesale electricity prices and the potential lack of a significant number of viable competitive suppliers, it is important that measures be taken to protect customers from the potential of a non-competitive and volatile electricity market. For these reasons, the public utilities commission should be given ample authority and flexibility in determining the appropriate length and terms of transition and default service for each electric utility.

III. A critically important measure that should be undertaken to protect customers from price volatility and a noncompetitive market is for the public utilities commission to delay the divestiture of Public Service Company of New Hampshire's . . . fossil and hydro generation assets until the commission determines such sale is in the public interest. Delay in the divestiture of PSNH's fossil and hydro generation assets would allow for the use of those assets to serve transition service. While this delay in divestiture is in the public interest today, the general court finds that competitive electricity markets should provide benefits for customers over the long term. When the sale of PSNH's fossil and hydro generation assets is in the public interest, the public utilities commission should proceed with the sale of those assets in order to establish competitive electricity markets.

IV. The planned sale of PSNH's generation assets will be done in a manner consistent with RSA 374:30 [generally requiring commission approval for sale of utility property].

V. Changes to RSA 369-B and RSA 374-F which are designed to protect PSNH customers from current price volatility must be accomplished in a manner that shall not affect the validity, effectiveness, or finality of Order No. 23,550 [i.e., the finance order under which

securitization went forward] issued by the public utilities commission, and does not diminish the value of the settlement agreement to either PSNH or PSNH's customers.

2001 N.H. Laws 29:4.

Much has been made of these findings by the parties to this proceeding. We pause to make a few observations about them. First, we believe that when one considers the phrase "price volatility" as used in its context, it becomes clear that the Legislature's concern was not simply changing prices, but the prospect of a sudden, upward movement in retail prices such as had been experienced in California. From this conclusion flows another: that the Legislature took the "critically important" step of delaying the divestiture of PSNH's non-nuclear generation portfolio in order to insulate customers from upward price shocks.

It is clear from the present record that several parties do not agree with this legislative judgment, which subordinates the development of a competitive market to the objective of rate relief, at least in the near term. These parties point to the language from paragraph III making clear that the Legislature has not abandoned the ultimate objective of complete divestiture and reliance on competitive markets. Such an argument, however, begs the question of how to reconcile that objective with other legislative imperatives.

As it did in 2000, the Legislature in 2001 crafted specific provisions with regard to the duration, the source and the price of PSNH Transition Service. For the customers other than those of the large commercial and industrial class, Transition Service must be available until at least 24 months after initial Transition Service end day, i.e., until at least February 1, 2006, at a price of 4.4 cents per kilowatt-hour through February 1, 2003, 4.6 cents from then until February 1, 2004 and PSNH's "actual, prudent and reasonable costs of providing such power" as approved by the Commission thereafter.<sup>9</sup> 2001 N.H. Laws 29:10, codified as RSA 369-B:3, IV(b)(1)(B)(i) and (ii).

For the large commercial and industrial customers at issue here, Transition Service must be available "at least 12 months after initial transition service end day" - i.e., until February 1, 2005 - with a price of 4.4 cents per kilowatt-hour through February 1, 2003. 2001 N.H. Laws 29:10, codified as RSA 369-B:3, IV(b)(1)(C). Thereafter, and until the date that PSNH ceases to provide Transition Service, the price must be "PSNH's

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<sup>9</sup> PSNH's actual, prudent and reasonable costs would form the basis of the price after February 1, 2004 only insofar as PSNH was providing Transition Service from its owned generation portfolio. Thereafter, i.e., following the divestiture of PSNH's generation portfolio, "the price of transition service, if offered, shall be the competitively bid price for transition service, or as determined under RSA 374-F:3, V(e)." See 2001 N.H. Laws 29:10, codified as RSA 369-B:3, IV(b)(1)(B)(ii).

actual, prudent, and reasonable costs of providing such power as approved by the commission." *Id.*

The Legislature also, in RSA 374-F:3, V(e), authorized the Commission to "approve alternative means of providing transition or default service" that are designed to minimize customer risk, not unduly harm the development of competitive markets and mitigate price volatility without creating new deferred costs. 2001 N.H. Laws 29:6.

Retained by the 2001 Legislature, but slightly modified to reflect the changed timetable, is the provision in RSA 369-B setting out the terms on which PSNH must reconcile any difference between the Transition Service price and the Company's actual, prudent and reasonable costs of providing the service.<sup>10</sup> Any such difference must "first be separated between the 2 groups of customers described in subparagraphs (b) (1) (B) and (b) (1) (C)" - i.e., the group consisting of residential, street lighting and general delivery rate G customers on the one hand and, on the other, the large commercial and industrial customers whose rate is at issue here. 2001 N.H. Laws 29:10, codified as RSA 369-B:3, IV(b) (1) (D). Following this

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<sup>10</sup> The original version of RSA 369-B specified that this reconciliation mechanism would apply from competition day to initial Transition Service end day. As revised in 2001, the mechanism applies from competition day until "the day that PSNH ceases to provide transition service." 2001 N.H. Laws 29:10, codified as RSA 369-B:3, IV(b) (1) (D).



separation. Such difference must first be used to offset any differences described in RSA 369-B, IV(b) (1) (B). The net must then be "reconciled for each group of customers either by changing the recovery end date, or by decreasing the stranded cost recovery charge, as the commission finds to be in the public interest." *Id.* We deem this language to be significant to the instant case because it reveals a clearly expressed legislative intention to isolate each of these two customer groups from the effect of any over-recovery or under-recovery resulting from the other's Transition Service rate.

## **6. Summary**

We discern from the evolving language used by the Legislature certain principles that guide our decision in this proceeding. First, we must act to further the overall public policy goal of restructuring - achieving a more productive New Hampshire economy by reducing costs to consumers while maintaining safe and reliable electric service. Second, we are constrained by the balance reflected in the original Restructuring Agreement and endorsed by the Legislature. Third, without altering its endorsement of the Restructuring Agreement, the Legislature required PSNH to retain and devote to Transition Service its non-nuclear generation portfolio so as to promote rate stability. Fourth, the Legislature made its determination

to delay divestiture with instructions that it not have the effect of altering the Restructuring Agreement, particularly as it bears upon the Rate Reduction Bonds. Fifth, in light of the potential impact of Transition Service on PSNH's recoverable stranded costs, the Legislature has divided the Company's customer base into two groups - large commercial and industrial customers and all others - and required us to insulate each group from the effects of the other's Transition Service costs as reconciled to rates. Sixth, as competitive markets develop, the Commission is authorized to approve alternative means of providing Transition Service, subject to certain constraints. See, RSA 374-F:3, V(e). Finally, RSA 374-F:3, V(d) provides that the Commission should establish Transition Service appropriate to the particular circumstances of each jurisdictional utility. Here, the Restructuring Agreement is a circumstance unique to PSNH; the Commission must therefore recognize the provisions of the Restructuring Agreement and the securitization legislation when determining whether above-market IPP costs and other costs may be included in Transition Service.

#### **B. ABOVE-MARKET IPP COSTS**

Each of the intervenors who opposes PSNH's proposed recovery of above-market IPP costs in the SCRC has offered an alternative. CES proposes a Transition Service rate that would

include the full cost of the IPP entitlements in the rate calculation, with an offsetting "rate mitigation credit" that can be applied either to the Transition Service rate or the Stranded Cost Recovery Charge. Exh. 9 at 1-2. *Id.* (CES does not specify amounts for either the rate or the credit, although its calculations assume a Transition Service rate of 6 cents per kilowatt-hour and a credit of one cent. *Id.*) All customers, regardless of whether they take Transition Service or obtain power from a competitive supplier, would receive the credit, which CES notes will have the effect of increasing Part 3 stranded costs.

Constellation complains that the PSNH proposal does not fully reflect the Company's actual cost of providing Transition Service because the PSNH rate calculation does not include the full IPP costs, among other things. Exh. 15 at 2. Constellation would simply increase the Transition Service price to reflect these factors.

Freedom's proposal is similar to that of CES. The Freedom proposal would set the Transition Service price at 5.83 cents per kilowatt-hour and provide a 1.36 cent credit to Transition Service costs for all customers regardless of whether they take Transition Service or opt for a competitive supplier. According to Freedom, "[t]he benefit of this approach is that it

will help to fulfill the legislative mandate under RSA 374-F that there be a transition period for a competitive market to develop prior to dumping over 400,000 unaware customers into the market." Exh. 12 at 3.

Sprague asks the Commission to set a Transition Service rate of 6.18 cents per kilowatt-hour to reflect the full cost of IPP power, with a 1.71 cent "shopping credit" credited against each customer's Stranded Cost Recovery Charge.

Each of these proposals has merit, in terms of incenting competition; the pricing of Transition Service and/or the timing and recovery of authorized PSNH stranded costs are deliberately structured to stimulate the development of a competitive retail energy market in the PSNH service territory for large commercial and industrial customers. However, as discussed below, we are not free to implement the policy choices urged upon us by the competitive suppliers. Their revised treatment of IPP costs, and their modifications to the regime for stranded cost recovery, are inconsistent with the applicable legislative determinations and the Restructuring Agreement.

One of the central tasks in this case is to determine whether the Legislature meant to include above-market IPP costs within the definition of "actual, prudent and reasonable costs." RSA 369-B:3, IV(b)(1)(C). In doing so, we discern no reason for

recourse to testimony before the legislature regarding the likely price path emerging from its directives as to source and reconciliation of Transition Service.<sup>11</sup> Even assuming that the phrase "actual, prudent and reasonable" is ambiguous standing alone, any ambiguity disappears when the phrase is considered in the context of the entire measure. Since Chapter 29 includes language that clearly indicates a legislative preference for leaving the Restructuring Agreement intact except insofar as it was explicitly modified, and given that the Restructuring Agreement clearly assigns the over-market IPP costs not to Transition Service but to Part 2 stranded costs, and further given that the Restructuring Agreement explicitly provides that IPP costs are recoverable through the non-bypassable Stranded Cost Recovery Charge and not otherwise, we conclude that the Legislature clearly intended PSNH's actual, prudent and

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<sup>11</sup> In seeking to illuminate the meaning of the phrase, CES has drawn the Commission's attention to the fact that PSNH President Gary Long testified before the Legislature in connection with the bill that eventually became Chapter 29, assertedly commenting on the question of whether the Company's actual, prudent and reasonable cost of providing Transition Service would or would not include the so-called "over market" costs associated with the Independent Power Producers (IPPs) in the PSNH service territory. There is no transcript of Mr. Long's legislative testimony, which CES urged we interpret as reflecting a PSNH view at the time that the over-market IPPs would or should be included in the costs recoverable in Transition Service rates, or that the Legislature understood they would be included. Indeed, certain provisions of the legislation suggest a contrary legislative view to the effect that above-market IPP costs would not be included, since their inclusion would have the effect of raising the assumed cost of Transition Service well above the price path apparently contemplated by the legislation. See, RSA 369-B:3, IV(b) (1) (D).

reasonable costs of Transition Service to include only the market value of IPP power. Thus, absent ambiguity, it would be inappropriate to consider legislative testimony or any other aspect of the legislative history. See *Goode v. Office of Legislative Budget Ass't*, \_\_\_ N.H. \_\_\_, \_\_\_, 2002 WL 31641526 at \*2 (2002).

We read the legislative findings in the 2001 enactment as indicative of a legislative judgment that the fundamental bargain in the PSNH Restructuring Agreement should remain intact. The agreement apportioned various benefits and risks among PSNH's owners, PSNH's customers and others with an interest in PSNH's operations, with a particular concern being the expectations of the purchasers of the Rate Reduction Bonds. It invoked a legislative definition of stranded costs that was enacted in 1996 and remains intact today, specifically including IPP costs as among those expenses that PSNH could recover via its Stranded Cost Recovery Charge (as opposed to via Transition Service rates). While our approvals of the Restructuring Agreement are subject to our authority to revisit them in appropriate circumstances (except as they relate to the securitization proceeds), see *PSNH Proposed Restructuring Settlement*, 85 NH PUC at 279-80, we conclude that the Legislature expects us to interpret Chapter 29 in a manner that

does not alter the allocations of risk and reward implicit in the Restructuring Agreement.<sup>12</sup>

Assigning the full cost of IPP power to Transition Service rates in this docket could alter the risks faced by PSNH with regard to recovery of Part 3 stranded cost.<sup>13</sup>

Assigning the full costs could result, and is proposed so as to result, in raising Transition Service rates to a level sufficient to cause some large commercial and industrial customers to avoid Transition Service and buy energy elsewhere. Whatever the virtues of such an outcome, it raises the

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<sup>12</sup> Under the terms of Chapter 29, it is necessary to accomplish this in the context of a directive that the provisions of the Restructuring Agreement be changed to this extent: "The sale of PSNH fossil and hydro generation assets shall take place no sooner than 33 months after competition day," i.e., February 1, 2004. *Id.* at section 13. It is important to bear in mind that February 1, 2004 marks the soonest date on which divestiture of these assets could take place, that the purpose of the delay is to permit the use of these resources for Transition Service and that the Commission is encouraged to cause PSNH to proceed with the divestiture only when such action becomes consistent with the public interest. See *id.* at section 4, III. These policy judgments can be reconciled with the codified statutes arising out of Chapter 29 that are relevant to the issue of Transition Service. The Legislature has now lengthened the maximum Transition Service period from four years after May 1, 2001 to five years. See 2001 N.H. Laws 29:5, codified as RSA 374-F:3, V(b). The "initial transition service end day" was changed from nine to 33 months after competition day, see 2001 N.H. Laws 29:9, codified as RSA 369-B:2, VIII - i.e., from February 1, 2002 to February 1, 2004.

<sup>13</sup> As was noted at hearing, pursuant to the Restructuring Agreement PSNH has recently terminated its entitlement to output from the Seabrook nuclear power plant (at the same time a PSNH affiliate sold its 35.98 percent interest in the plant) and the sale proceeds, credited to Part 3 stranded costs, were significantly in excess of those predicted at the time of the Restructuring Agreement. All other things being equal, these Seabrook developments are almost certain to have the effect of causing Part 3 stranded costs to be fully recovered prior to the Recovery End Date. In this sense, a major risk assumed by PSNH under the Restructuring Agreement had redounded to the Company's benefit, which of itself does not provide a basis for altering the agreement.

possibility of increasing Part 3 stranded costs, thus increasing the financial risk to PSNH. Such a scenario also arguably creates "new deferred costs", which is prohibited by RSA 374-F:3, V(c).

Moreover, as OCA has pointed out, failing to include over-market IPP costs in Part 2 stranded costs raises the specter of residential customers subsidizing under-recoveries associated with Transition Service provided to large commercial and industrial customers - a state of affairs that would run directly afoul of RSA 369-B:3, IV(b) (1) (D). As OCA notes, the intention of this provision is to prevent such subsidies, via one of two methods: changing the recovery end date applicable to Part 3 stranded costs or by decreasing the Stranded Cost Recovery Charge applicable to a particular customer group. OCA further notes that, as approved by the Commission before the Seabrook sale occurred, the Restructuring Agreement opts for the former methodology - recovery end date adjustment. See Restructuring Agreement at lines 774-785. The OCA's point arises out of PSNH's testimony that, given the larger-than-expected proceeds from the Seabrook transaction, PSNH is virtually certain to recover all Part 3 stranded costs regardless of any otherwise applicable adjustments to the recovery end date. See, e.g., Tr. 12/19/02 at 177-79, 235-38.



Thus, according to OCA, there is essentially no way residential ratepayers can avoid stranded cost obligations resulting from Transition Service-related under-recoveries from large commercial and industrial customers. We agree with OCA insofar as its argument relates to the current treatment of underrecoveries.<sup>14</sup>

Assigning the full cost of IPP power to Transition Service rates also raises the risk that migrating customers could bypass a portion of the above-market IPP-related costs that would otherwise be recoverable from them as Part 2 stranded costs. As PSNH notes, this would be contrary to the prohibition against bypassability set forth in RSA 374-F:3, XI(I)(d).

An additional issue that arises in the context of the Restructuring Agreement and the ensuing legislation authorizing the securitization of certain PSNH stranded costs is the extent to which actions we might take here could interfere with the rights and/or legitimate expectations of the holders of the Rate Reduction Bonds. Deviating from PSNH's proposal would not amount to an assault on the revenue stream associated with the obligation to the bondholders, inasmuch as recovery of Part 1

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<sup>14</sup> We note that it is also theoretically possible that an over-recovery in the Transition Service balances associated with the large commercial and industrial customers, and/or under-recoveries in connection with the other group of customers, could trigger a similar problem. This is an issue properly addressed at a time when the rates of all customer classes are before us for determination.

stranded costs under the Restructuring Agreement is not in question. However, PSNH witness Hall expressed concern at hearing that proposals affecting the overall stream of stranded cost revenues could be of concern to bondholders because there is "less revenue overall to provide a cushion for unusual events." Tr. II at 169. Likewise, PSNH witness Long referred to the "extreme caution" taken to assure that the Rate Reduction Bonds received a Triple-A rating (thus assuring a favorable interest rate from the standpoint of the ratepayers), which, in turn, implicated the full Stranded Cost Recovery Charge. *Id.* at 217. Freedom agreed with this assessment. *Id.* at 62, 169.

We need not go so far as to suggest that the holders of RRBs would have a legal right to challenge any reductions we might authorize here to the overall stream of Stranded Cost Recovery Charge revenue. Nor is it necessary for us to reach the question of whether the bondholders would be entitled to seek additional security, thus increasing recoverable Part 1 stranded costs, if we took such an action. It suffices for us to determine here that it would be inconsistent with the public good for us to take actions that could have such an effect.

Some intervenors have complained about the failure of PSNH to treat the IPP obligations as it would any other aspect of the generation capacity it is using for Transition. These

parties cite an inconsistency in crediting estimates of Transition Service balances with revenues associated with wholesale proceeds from off-system sales of excess generation capacity (thus tending to reduce Transition Service rates) while failing to charge over-market IPP costs to such balances (which has the opposite effect on Transition Service rates). These arguments are not persuasive, for a number of reasons.

The Restructuring Agreement did not take into account the possibility that PSNH would be devoting its IPP obligations to Transition Service load as opposed to selling the output on the wholesale market. At a time when PSNH was assumed to be marketing its IPP entitlement at wholesale, the Restructuring Agreement provided that the Company's IPP costs would be recoverable as a Part 2 stranded cost. Restructuring Agreement, lines 586-602. It was clearly contemplated that these Part 2 recoverable costs would be net of "revenue from the sale of IPP power on the wholesale market." *Id.* at lines 598-99. The competitive suppliers do not cite this fact in support of their position with regard to the calculation of Transition Service prices here. It is nonetheless useful to consider whether the continued existence of an expressed obligation for PSNH to sell the IPP output into the market (and recover its above-market costs via Part 2 Stranded Costs) can be reconciled with PSNH's

unchallenged practice of using its IPP entitlements to provide Transition Service, including the costs of Transition Service up to an estimated market price, and reflecting only the above-market amounts in Part 2 Stranded Costs.

Given that PSNH has retained ownership of its fossil and hydro generation assets as well as its IPP obligations for a period longer than the Restructuring Agreement contemplated in 1999, it is not economically efficient for PSNH to sell its generation capacity into the regional wholesale market and then buy back its Transition Service-related needs. Moreover, devoting the generation portfolio to Transition Service has the same net effect on PSNH revenues, and on the amount and allocation of the costs and risks of Stranded Cost and Transition Service, as the paradigm established under the Restructuring Agreement.

Finally, we agree with PSNH witness Long that were PSNH to shift off-system fossil-hydro sales revenues from its Transition Service calculation to the Part 3 Stranded Cost calculation, it would have to shift the related fossil-hydro costs out of Transition Service into Part 3 Stranded Costs as well. The result would essentially be a wash.

Several of the competitive supplier intervenors have suggested that PSNH's proposal would lead to dire consequences

at the end of the transition period. They posit that the availability of Transition Service will end at a time when no other alternatives will be available, citing the Legislature's explicit determination that Transition Service "should be available for . . . not more than 5 years after competition has been certified to exist in at least 70 percent of the state pursuant to RSA 38:36." RSA 374-F:3, V(b). Since the Commission made the referenced certification on May 1, 2001, Transition Service ceases to be an option by operation of law on May 1, 2006.<sup>15</sup>

Those who posit a doomsday scenario overlook certain realities: (1) The provisions of RSA 369-B that contemplate random assignment of Transition Service customers to competitive suppliers are not self-executing but, rather, require affirmative Commission determinations that such assignments would be in the public interest, see RSA 369-B:3, IV(b)(1)(B)(iii); (2) default service is also available to customers for whom Transition Service is no longer an option, see RSA 374-F:2:I-a; (3) PSNH has indicated here that its proposal involves setting a Default Service price equal to the

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<sup>15</sup> We note that only three months separate February 1, 2006 - the end of the shortest possible Transition Service period pursuant to RSA 369-B:3, IV(b)(1)(B)(i) - and May 1, 2006, the last possible date Transition Service will be available to any customers under RSA 374-F:3, V(b).

Transition Service price;<sup>16</sup> and (4) the Legislature could, if deemed appropriate, extend the Transition Service period. In other words, the worst-case scenario is that Transition Service ends on May 1, 2006, that competitive prices at the time are significantly higher than PSNH's costs, and that, in the absence of competitive suppliers offering service, the PSNH customer base would be placed on default service at rates identical to those for Transition Service (and lower than the competitive rate). While this is arguably not a desirable outcome, it is not a threat to the prospect of safe and reliable electric service.

The understandings we have expressed above as to the meaning of the applicable legislation and the meaning of the Restructuring Agreement leave us unable to approve any of the alternative proposals for IPP treatment advanced here by CES, Constellation, Freedom or Sprague.

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<sup>16</sup> The price of Default Service, and other matters related to PSNH's default service tariff, were not contested issues and received little attention at hearing. We note, however, that an error in PSNH's delivery service tariff No. 2 persists with respect to Default Service. Specifically, paragraph 27 recites that "[s]ubsequent to the first nine months following Customer Choice Date, the rates and charges under the Company's Default Energy Service Rate DE shall be determined through a competitive bid process administered by the Commission." PSNH should correct this provision as part of its compliance filing in this docket.

**C. OTHER PROPOSED ADJUSTMENTS**

CES and Constellation argue that the costs of administering PSNH's provision of Transition Service, including associated bad debt, should be included in the Transition Service rate, rather than being recovered in the Delivery Charge, as reflected in PSNH's filing. PSNH's methodology for recovering administrative costs attributable to Transition Service is specified by the Restructuring Agreement: "[t]he administrative costs of acquiring, billing and managing Transition Service will be recovered through the Delivery Charge for all customers." Restructuring Agreement, lines 929-30. As PSNH witness Hall explained at hearing, this language appears in the context of a discussion of how the Company would provide Transition Service energy acquired by PSNH through bidding on the wholesale market as opposed to its own generation portfolio. We nevertheless discern from this language an assumption in the Restructuring Agreement that PSNH should recover administrative costs through the delivery charge even if competitive suppliers would have to recover similar expenses through their energy charges. There is no reason to apply a different assumption here.

Further, bad debt associated with Transition Service sales (reflected in booked write-off of uncollectable revenues)

was implicitly included in the delivery charge set as a product of the Restructuring Agreement and implementing legislation. Thus, PSNH would enjoy a double-recovery of such costs if we were to place such bad debt in the Transition Service rate as well. In addition, neither Constellation nor CES attempted to quantify the amounts associated with administrative costs, including bad debt.

Constellation argues that Transition Service prices should also reflect a cost associated with "migration risk," i.e., the revenue lost when customers depart for competitive suppliers. We do not agree that "migration risk" is a cost incurred by PSNH, however much a competitive supplier would likely factor such a risk into the price it offers a prospective customer. The legislative plan for PSNH restructuring contemplates that, for the customers whose Transition Service price is at issue here, the difference between the cost of Transition Service and the revenues for the same (other than IPP costs and other Part 2 costs) be reconciled via Part 3 stranded cost recovery adjustments.<sup>17</sup> We will not establish a different treatment of such revenue shortfalls. For the same reason, we are unable to agree with Sprague's proposal that over-recoveries

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<sup>17</sup> As noted above, the Commission approved the option of changing the Recovery End Date as the mode of adjustment. *Re: PSNH Proposed Restructuring Settlement*, Order No. 23,549 (September 8, 2002).



and under-recoveries from Transition Service be reconciled in the Transition Service rate for the succeeding period.

On a related topic, we do not deem it necessary to take up the suggestion of some parties that PSNH should be required to purchase options or employ some other hedging strategy so as to fix its Transition Service costs at the outset. As Mr. Shuckerow explained, given the Company's relatively low exposure to such risks there is no reason (for purposes of estimating the Company's actual, prudent and reasonable costs) to require PSNH to pay the premium associated with such hedging.<sup>18</sup>

Constellation urges that Transition Service prices vary monthly, as PSNH's costs vary. There is considerable logic to Constellation's suggestion of Transition Service prices that vary monthly, as such a price path would better reveal to consumers the variation in the cost to produce power (while also mitigating migration risk). However, we cannot conclude on the present record that such a proposal would strike an appropriate balance among the restructuring policy principles in RSA 374-F:3. Of particular relevance is the objective of providing

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<sup>18</sup> We note, however, that we express no opinions here that might bear on any after-the-fact review of PSNH's prudence. We simply conclude that PSNH's presently expressed expectations as to how it will meet its Transition Service obligations are reasonable predictions for purposes of pegging Transition Service rates to what are likely to be the Company's actual, reasonable and prudent costs for the period the rates cover.

customers with "the option of stable and predictable ceiling electricity prices" during the transition period in a manner that is also consistent with the principle of near-term rate relief. See RSA 374-F:3, V(b). We have found it consistent with the legislative scheme to move away from annual fixed Transition Service prices to seasonal variations in prices for which there were sound economic justifications. See *Granite State Electric Co.*, Order No. 23,966 (May 8, 2002). Here, the idea of seasonal variations, however, was not explored on the record, and there are potential conceptual problems with merely reflecting the PSNH monthly cost. For example, PSNH's data shows a cost spike in April, which would result in a corresponding Transition Service price spike, for reasons that arguably are unrelated to sending appropriate price signals to customers of the service. If the cost spike is a function of a planned outage, then such costs might be appropriately allocated across the entire Transition Service period. The parties gave insufficient attention to Constellation's proposal, leaving such questions unexplored and unanswered at this time. In any event, as suggested by our Granite State order, we do not intend our decision today to rule out a variable Transition Service price for PSNH customers in appropriate circumstances and based on a fully developed record.

One issue remains, that of the basis for estimating the market price used in the calculation. PSNH came to agree with the competitive suppliers that its market price estimates should be based on information available as to futures prices for the period in question. However, the competitive suppliers urged that the price be calculated based on the most recent posting of such futures prices. PSNH disagreed, continuing to propose that the price be set at 4.6 cents calculated based on projected market conditions as of November 21, 2002. We agree with the competitive suppliers that the more recent data is a better predictor of market prices, in this case.

We agree with those witnesses who testified at hearing that, for purposes of estimating PSNH's actual, prudent and reasonable costs during the proposed Transition Service period, the most reliable figure is likely to be the one obtained using the most recently available market data. There is, of course, a potential that any given day's market data will be overly reliant on the particular exigencies of that day. However, as Exhibit 5 makes clear, there has been a consistent upward trend in wholesale prices since PSNH filed its initial petition in

September. This reinforces our view that the best estimate to use is based on a recent snapshot of the market.<sup>19</sup>

Hence, we find that Transition Service prices should be those as estimated on Exhibit 5, submitted by PSNH on December 26, 2002 in response to a record request at hearing. *Inter alia*, Exhibit 5 reveals that, if PSNH's cost estimate methodology were applied to market conditions on December 19, 2002 (the final day of hearings in this docket), the resulting price would be 4.67 cents per kilowatt-hour. This is the price we will direct PSNH to implement.

#### **IV. CONFIDENTIALITY MOTIONS**

The only remaining issues concern two documents for which confidential treatment has been sought under RSA 91-A. On November 1, 2002, PSNH submitted a motion for confidential treatment with regard to a response to a Staff discovery request, noting that the response included a spreadsheet showing particular coal prices supplied from specific sources available to PSNH. On December 19, 2002, at the Commission's request,

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<sup>19</sup> We could, of course, carry this logic even further and direct PSNH to revise and update its estimate on some date closer to the beginning of the applicable Transition Service period on February 1, 2003. Our view is that the public interest is better served by not prolonging uncertainty to that extent.

Constellation provided a document, marked and admitted as Exhibit 14, that included estimates prepared by a Constellation affiliate that described components affecting retail price estimates of competitive suppliers and the relative effects of those factors on the quoted prices. Constellation indicated at hearing that it was providing the exhibit subject to a request for confidential treatment.

The New Hampshire Right-to-Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. See RSA 91-A:4, I. The statute contains an exception, invoked here, for "confidential, commercial or financial information." RSA 91-A:5, IV. In *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997), the New Hampshire Supreme Court provided a framework for analyzing requests to employ this exception to shield from public disclosure documents that would otherwise be deemed public records. There must be a determination of whether the information is confidential, commercial or financial information "and whether disclosure would constitute an invasion of privacy." *Id.* at 552 (emphasis in original, citations omitted). "An expansive construction of these terms must be avoided," lest the exemption "swallow the rule." *Id.* at 552-53 (citations omitted). "Furthermore, the asserted private

confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, . . . since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." *Id.* at 553 (citations omitted).

Our applicable rule is designed to facilitate the employment of this balancing test. We require a motion for confidentiality to contain (1) the specific documents or portions thereof for which confidential treatment is sought, (2) reference to statutory or common law authority favoring confidentiality, (3) "[f]acts describing the benefits of non-disclosure to the public, including evidence of harm that would result from disclosure to be weighed against the benefits of disclosure to the public," and certain evidence. Puc 204.06(b). The evidence must go to the issue of whether the information "would likely create a competitive disadvantage for the petitioner." *Id.* at (c).

We find that PSNH and Constellation have made the requisite showing to justify confidential treatment of both documents. As PSNH notes, Puc 204.06(c)(1)(b) specifically contemplates that "fuel supply contract prices and terms" are among the kinds of information entitled to confidential

treatment given the likelihood that their disclosure would create a competitive disadvantage to the petitioner. Likewise, it would obviously place Constellation and its affiliates at a disadvantage if there were a public disclosure made of the methodologies these companies use in developing retail prices. For these reasons, the pending motions for confidential treatment are both granted.

#### **V. CONCLUSION**

We will adopt PSNH's methodology, using the most recent futures prices on the record before us, to arrive at a Transition Service rate of 4.67 cents for large commercial and industrial customers in the PSNH service territory, because we find this approach to be the most consistent with the applicable law.

Our decision today is obviously not the final chapter in the discussion of how best to harness competition in the PSNH service territory so as to promote safe and reliable electric service at the lowest possible rate. The record adduced here will provide a good basis on which to build further debate. Meanwhile, the rate we approve today is the one that best reflects PSNH's "actual, prudent and reasonable costs" as that phrase is properly applied in its legislative context.

**Based upon the foregoing, it is hereby**

**ORDERED,** that the petition of Public Service Company of New Hampshire with respect to Transition Service rates applicable under RSA 369-B:3, IV(b)(1)(C) is GRANTED insofar as it would result in a rate of 4.67 cents applicable from February 1, 2003 through January 31, 2004 and is otherwise DENIED; and it is

**FURTHER ORDERED,** that Public Service Company of New Hampshire shall submit a compliance tariff within three business days of the entry of this Order; and it is

**FURTHER ORDERED,** that the pending motions of Public Service Company of New Hampshire and Constellation NewEngery, Inc. for confidential treatment of documents are GRANTED; and it is

**FURTHER ORDERED,** that the determination as to confidential treatment of documents is subject to the ongoing authority of the Commission, on its own motion or on the motion of Staff or any member of the public to reconsider such determination in light of RSA 91-A, should circumstances so warrant.



By order of the Public Utilities Commission of New  
Hampshire this thirtieth day of January, 2003.

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Thomas B. Getz  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Debra A. Howland  
Executive Director and Secretary